

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2005G044

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

TONI R. LUCCI-WOLGAMOTT,

Complainant,

vs.

DEPARTMENT OF NATURAL RESOURCES, BOARD OF LAND COMMISSIONERS,

Respondent.

Administrative Law Judge Hollyce Farrell held the hearing in this matter on February 5, 6, 12, 20, and April 10, 2007, at the State Personnel Board, 633 17th Street, Courtroom 6, Denver, Colorado. The parties submitted written closing arguments. After closing arguments were submitted, the record was closed on May 22, 2007. First Assistant Attorney General Stacy L. Worthington and Assistant Attorney General Douglas J. Cox represented Respondent. Respondent's advisory witness was Britt Weygandt, the Director of the State Land Board. Complainant appeared and was represented by N. Nora Nye, Attorney at Law.

MATTER APPEALED

Complainant, Toni Lucci-Wolgammott (Complainant) appeals her termination from the State Land Board (SLB or Respondent). Complainant, who was a probationary employee, alleges that she was terminated in violation of the Colorado State Employee Protection Act (Whistleblower Act). Complainant seeks reinstatement to her previous position at the SLB; back pay, plus interest; removal of all evidence of her termination from her personnel files; appropriate discipline for Weygandt and two other SLB employees, Felicia Bautista and Tobin Follenweider, pursuant to the Whistleblower Act; and attorney fees and costs.

For the reasons set forth below, Respondent's action is **affirmed**.

ISSUES

1. Whether Complainant was terminated in violation of the Whistleblower Act;
2. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant was hired in February 2003 as a contract Administrative Assistant II at the SLB in the Field Operations Section, where she was supervised by Susan McCannon.
2. In December of 2003, Britt Weygandt became the director of the SLB and the Appointing Authority for the SLB employees. Complainant took an immediate liking to Weygandt and discussed personal matters with her. Weygandt gave Complainant her personal email address to discuss non-work related matters because Weygandt did not find it appropriate to use the state email system to discuss personal matters. Complainant found Weygandt to be approachable.
3. In January of 2004, two permanent positions were posted at the SLB. One of those positions was for an Account Technician II position in the SLB's Financial Section. Complainant applied for both of the posted positions, but interviewed only for the Account Technician II position because Weygandt told her it would be a better position for her.
4. Complainant was offered the Account Technician II position, and began working in that position on February 25, 2004. For a period of time, she also continued to work in the Field Operations Section. When Complainant was hired into the Financial Section, Weygandt told her that she might certify her after six months instead of a year; however, Weygandt did not promise to certify Complainant earlier than one year.
5. In the Financial Section, Complainant's first level supervisor and lead worker was Felicia Bautista, who held the position of Accountant I. Bautista has worked for the SLB since 1993; she is very knowledgeable about the SLB's accounting functions, as well as the fiscal and procurement statutes, rules and procedures. She has the most experience of anyone at the SLB in dealing with fiscal and procurement rules, which change often.
6. In approximately March or April of 2004, Tobin Follenweider was hired as the SLB's Chief Financial Officer. Follenweider was Complainant's second level supervisor. Follenweider reports to Weygandt.

Complainant's Position in the Financial Section

7. When Complainant was hired to work in the Financial Section, she received training on the state procurement code and other training pertinent to her job in the Financial Section. The documents relied upon in the Financial Section include the procurement code, the fiscal rules, and the purchasing manual.

Complainant had ready access to all of these documents on both the Internet and SLB's in-house drive.

8. In the course of her training on the fiscal and procurement rules, Complainant was taught that she could have personal liability if the rules were not followed correctly.
9. Complainant's job duties as an Account Technician II included processing payments, purchase orders, and general vouchers. The Account Technician II position was mostly one of data entry.
10. In April of 2004, Complainant began raising issues with Bautista in an "attacking" manner. For example, in one instance, Complainant told Bautista that the Land Board was "stupid" and "didn't know what they were doing." According to Bautista, Complainant's assessment in that situation was incorrect. Bautista felt that Complainant's personality had an edge to it.
11. Complainant repeatedly raised issues with Bautista and others at the SLB indicating that she thought the SLB was processing matters incorrectly.
12. When Complainant brought up questions, Bautista saw them as training issues, and did not reprimand Complainant.
13. Complainant criticized her co-workers. Bautista heard Complainant say that Follenweider was "wishy washy." Complainant also said a co-worker was "dumb and stupid and it took her a day to create an email." She criticized another co-worker for her inability to complete her work because of health issues. Bautista reported these incidents of criticism to Follenweider, as well as Complainant's occasional lack of professionalism and anger surrounding certain work issues.
14. Complainant spoke unprofessionally to Follenweider. She told Bautista that she was unhappy with her relationship with Follenweider, and that she did not like him. Complainant never told Bautista that she was afraid of Follenweider or that he might hurt her. As a friend, and not as a supervisor, Bautista suggested that Complainant look for a different job because of her unhappiness with Follenweider. Bautista did not tell Follenweider that Complainant was unhappy.
15. Complainant met with Mark Davis, the Minerals Director at the SLB, on two occasions to discuss her concerns regarding Follenweider. Davis was not Complainant's supervisor or in her chain of command. Complainant told Davis that she was not getting along with Follenweider, but she never told Davis that she felt threatened by him, or was afraid of him. Davis advised Complainant to address her concerns at the lowest level possible and not go to Weygandt about them. Complainant was not visibly upset or agitated when she spoke to Davis about Follenweider.

16. In June of 2004, Complainant told Weygandt that Follenweider's voice was loud and that it bothered her. Complainant did not indicate that Follenweider had been yelling or that he had been angry. She merely complained about the volume of his voice. Complainant never told Weygandt that she was afraid of Follenweider until after she was terminated from the SLB.

17. Follenweider is a loud, exuberant person, but was not threatening to any of his co-workers, including Complainant. Sometimes, Follenweider would become angry while alone in his office. On at least two occasions, he threw objects, once a pad of paper and another time something else (perhaps a stapler) in his office while he was alone. On at least one occasion, he slammed down his telephone receiver in anger. Follenweider sometimes used foul language in the office. Follenweider never directed threats of violence towards Complainant, or any other employee.

Lease Application Backlog Issue

18. In the course of her work at the SLB, Complainant discovered that there was a large backlog of lease applications for state owned properties. Because of the backlog of the lease applications, there were lessees operating on state land where there was no lease in place. Accordingly, the SLB was not receiving any revenue for the use of those lands.

19. The issue of the lease backlog was common knowledge and longstanding; it had been a problem since 1997 when a person in the Field Operations unit retired. Weygandt was aware of it when she was first appointed to the SLB. The issue had also been published in a State Auditor's report, and there had been numerous studies done regarding the backlog. The issue was on Weygandt's mind even before she started her position as the SLB Director, but she wanted to wait until she had hired a chief financial officer before addressing it.

20. In May of 2004, Complainant talked to Weygandt, Bautista and others about the issue of the lease application backlog. Every person at the SLB with whom Complainant spoke about the lease application backlog issue was already well aware of the issue.

21. On May 17, 2004, Weygandt sent out an email to members of the Financial Section concerning the lease application issue asking them for specific information to assist her in addressing the issue.

Liquidating Purchase Orders

22. In June of 2004, towards the end of the fiscal year, Daniel Thompson, an SLB section manager, requested that several purchase orders be liquidated, and the money be used to purchase computers.

23. Complainant believed this was improper because she incorrectly thought that any liquidated money should revert back to the State General Fund, which is funded by the taxpayers. However, because the SLB is cash funded, generating its own income, none of its funds went to the General Fund. None of the SLB's funds originated from the General Fund.
24. The SLB has the authority to spend its funds as it sees fit in order to meet its goals. It is not illegal or improper for the SLB to liquidate personal services purchase orders and use the funds to purchase commodities such as computers.
25. Bautista asked Complainant to work on the process of the purchase orders being liquidated and allowing for the purchase of the computers. Complainant told Bautista that she thought the request was illegal or improper.

Kris Chavez Contracts

26. A contract employee for the SLB, Kris Chavez, had two contracts. One was in the name of his company, and the other was in his name as an individual. He used his social security number for the contract in his individual name and a taxpayer identification number for his business.
27. There is nothing improper about an individual having multiple contracts, as long as the contracts combined do not exceed \$25,000 for a fiscal year.
28. Although Complainant believed that the SLB was doing something illegal by allowing Chavez to have multiple contracts, it was not. Chavez's contracts combined did not exceed \$25,000. Complainant told Follenweider and John Brejcha, the Deputy Director of the SLB, and others that she would not allow Chavez to have another contract because she thought it was illegal or inappropriate. Complainant refused to process another purchase order for Chavez's contract.
29. Brejcha again asked Complainant to complete the purchase order for Chavez. Complainant agreed, but said she would follow the law. Brejcha replied, "That's all I expect you to do," or words to that effect.
30. Complainant also complained to Follenweider on a number of occasions that Chavez wasn't doing his work, and indicated that she wanted Chavez to be fired. Follenweider appreciated receiving this information, but felt that Complainant was too involved in Chavez's personal business.
31. On another occasion, Chavez asked Complainant to change a date on an invoice so he could be paid even though there was no money left on his contract. Complainant discussed the issue with Brejcha, Follenweider and Bautista. The final resolution of this issue is unknown.

Lost Purchase Orders

32. During the summer of 2004, a number of purchase orders submitted by SLB to the Department of Natural Resources accounting office for approval had been lost. Complainant reported the information about the lost purchase orders to Follenweider.
33. In order to address the problem, Follenweider asked Complainant to put all of the information regarding the lost purchase orders in a memorandum so they could address the problem.
34. Complainant did draft the memorandum, addressed to Follenweider, but believed that the intention of it was to somehow get a woman in the accounting office, Maggie Van Cleef, in trouble. Complainant's belief regarding the purpose of the memorandum was unfounded.
35. Follenweider did later meet with Van Cleef to discuss the issue of the lost purchase orders.

Reducing Purchase Orders

36. All purchase orders over \$5,000 must go through the Department of Natural Resources accounting office for approval.
37. Sometimes, in order to make sure contractors get paid timely, the SLB would reduce purchase orders to \$5,000 or less. There is nothing improper or illegal about this practice. The SLB did not reduce purchase orders in order to circumvent the Department of Natural Resources accounting office.
38. When Follenweider told Bautista at the end of the fiscal year in June of 2004 that she could lower the amount of some purchase orders, Complainant incorrectly believed that the SLB was doing something illegal by reducing the purchase order amounts. Complainant finally did reduce them, as directed, but did so under protest. Complainant told Follenweider that she thought reducing the purchase order amounts was not proper.

SLB Hire of Temporary Employees

39. In August of 2004, the SLB decided to hire three individuals on a temporary basis. During an SLB staff meeting, an announcement was made that the temporary employees had been hired.
40. Because neither the State Personnel Board rules nor applicable statutes require that a temporary position be posted or that applicants must be tested, the positions were not posted. Likewise, the individuals who were hired did not test for the positions.

41. Complainant incorrectly believed that the SLB had violated the State Personnel Board rules by hiring for the position without posting and testing. She was very upset about the issue and went to talk to Weygandt about it.
42. Upon talking with Complainant, Weygandt realized that Complainant had no experience with the State Personnel Board rules. Thus, she took out a copy of the rules and went over them with Complainant and then explained why it was appropriate to hire an individual on a temporary basis without posting or testing. At no time during the meeting did Complainant tell Weygandt that Follenweider had gotten angry at her for raising the issue. She also did not tell Weygandt that Follenweider wanted to hit her; if Complainant had said this, Weygandt would have become very alarmed and started an investigation.
43. Because Complainant had misunderstood the rules surrounding the hiring of temporary employees, Weygandt was concerned that others may have also misunderstood, and she sent an email to the SLB's Denver staff explaining the rules for hiring a temporary employee on a personal service contract.

KRONOS Issue

44. In early August of 2004, Follenweider discovered that there had been an error in the Department of Natural Resources timekeeping system, known as KRONOS. An error in the system gave Complainant and another employee an hour of compensatory time, to which they were not entitled, every day they worked. The error was not the fault of Complainant or the other employee. By the time the error was discovered, Complainant had accrued 127 hours of compensatory time.
45. When Follenweider discovered the error, he explained to Complainant and the other employee that they were not entitled to the compensatory time. The other employee understood that there had been an error and accepted the adjustment of her compensatory time hours. Complainant, however, told Follenweider that she was entitled to the compensatory time because of extra hours she had worked.
46. After Follenweider consulted with Bautista regarding the issue, he decided to honor Complainant's claim for some compensatory time. He asked Complainant to work with Bautista to arrive at a fair number of hours. A few days later, Complainant, without ever consulting with Bautista, told Follenweider that she was entitled to eighty hours of compensatory time. Ultimately, Follenweider decided to authorize forty hours of compensatory time, even though he felt Complainant was only entitled to three days; Follenweider wanted to recognize Complainant's contributions to the Financial Section and the SLB.

47. When Complainant first learned of the error, and was told that she would lose all of her compensatory time, she acted unprofessionally toward a woman in the Human Resources office when discussing the issue. Additionally, after the forty hours was authorized, Complainant maintained an attitude that she had been cheated out of time to which she was entitled.
48. Weygandt asked Follenweider to draft a memorandum to her regarding the compensatory time issue and explain why so many hours of compensatory time were authorized. In that memorandum, Follenweider told Weygandt about Complainant's unprofessional conduct surrounding the issue.

Reallocation of Bautista's Position

49. In August of 2004, Follenweider recognized that Bautista had been doing work beyond her Position Description Questionnaire (PDQ). Thus, he wanted to modify her PDQ so that it would reflect her actual job responsibilities.
50. When a PDQ is modified, or reallocated, the person occupying the position has to apply for it. The position must be announced and anyone, including the person occupying the position, can apply for it.
51. Bautista's upgraded position was announced and the position was open for five days. Complainant and Bautista both applied for the position. Complainant did not understand that if she got the position, Bautista would not have a job.
52. When Tina Miller of the Human Resources Office received Complainant's application, she reviewed it and determined that Complainant did not meet the minimum qualifications for the position. Specifically, Complainant did not have the experience required for the position.
53. On August 9, 2005, Miller called Follenweider and told him that Complainant had applied for the reallocated position, but did not meet the minimum qualifications. Miller called Follenweider because the position was encumbered by Bautista and it was Miller's responsibility to tell him that multiple applications had been received. If someone other than Bautista received the position, Bautista would lose her job and she would possibly have bumping rights to other positions. As Bautista's supervisor, Follenweider needed to have that information.
54. When Follenweider heard from Miller that Complainant had applied for the position, but did not have the requisite experience, he went to Complainant and told her that he knew she had applied, but did not have the experience.
55. Although the position had not yet closed, Miller sent a letter to Complainant informing her that she did not meet the minimum qualifications for the position. When Complainant got home and read the letter on August 9, 2004, she called and left Miller two voice messages after business hours. Miller was surprised

because Complainant sounded very agitated in the messages she left. In the second message, Complainant spoke until she was cut off by the message system.

56. Miller was so concerned by the tone of the voice messages that she recorded them on a compact disc and transcribed them. She also told Weygandt about the messages because she thought Weygandt should be aware of Complainant's level of agitation. Miller had her supervisor listen to the messages. After listening to them, Miller's supervisor told her not to meet alone with Complainant.
57. Neither Follenweider, nor anyone else, told Bautista that Complainant had applied for her position. Bautista did not learn that information until after Complainant had been terminated.

Hiring of Kevin Holst

58. In late September of 2004, the SLB's Real Estate Section needed immediate assistance because Arapahoe County had passed some laws regarding properties, and it was essential that the SLB understand those laws and respond to them quickly.
59. Weygandt knew of a law school graduate, Kevin Holst, who was awaiting the results of a bar examination, and was available for work.
60. Weygandt needed a purchase order to hire Holst on a temporary basis. Complainant brought the purchase order to Weygandt, and Weygandt asked her to show her how to enter a purchase order into the system. Weygandt wanted to learn how to initiate a purchase order. Ultimately, Weygandt did not enter the purchase order, and had another employee do it for her.
61. Under the procurement rules, an employee who is being paid under a purchase order cannot start work until the purchase order is approved. Weygandt mistakenly believed that it took three to seven days to process a purchase order, when it actually took two weeks. When Weygandt learned of her misunderstanding regarding the processing time, she called Holst and told him he could not begin work before the purchase order was approved.
62. Holst's purchase order was orally approved by Maggie Van Cleef, a person with authority for approval, on October 8, 2004. On that date, Weygandt called Holst and told him that he could begin work.
63. Between October 8, 2004, and October 13, 2004, Holst worked fifty-three hours. Holst did not work prior to the time his purchase order was approved, and was not paid for any work prior to the approval date of his contract, October 8, 2004. Had Holst worked any hours at the SLB before his purchase order was approved, he would not have been paid for those hours.

64. Complainant believed that Holst began working before his purchase order was approved and told Bautista and others that she thought it was illegal for Holst to be paid.

Starboard Realty and Sole Source Justification

65. A contractor for the SLB, Starboard Realty, was doing work for the SLB on a project known as the Lowry project.

66. When the SLB was contemplating renewing Starboard Realty's purchase order, they considered doing a sole source justification instead of sending the contract out for bids. Bidding is required when a vendor is going to receive over \$25,000. A sole source justification, which has to be approved by Department of Natural Resources accounting, is appropriate when a vendor has specialized knowledge.

67. While there is nothing inappropriate about a sole source justification, it turned out to be unnecessary in this instance because Starboard Realty only received \$25,000. Thus, bidding was not required.

68. Complainant thought doing a sole source justification was illegal because of the type of services Starboard Realty provided. Complainant told Brejcha about her concerns regarding the sole source justification issue.

October 22, 2004 Meeting

69. Over time, based on his own observations and interactions with Complainant, as well as the reports he received from Bautista and Miller, Follenweider became increasingly concerned about Complainant's behavior at work and her interpersonal skills.

70. Follenweider spoke with Weygandt about his concerns regarding Complainant's behavior. Follenweider was particularly concerned about Complainant's criticisms regarding other employees; he felt that she unfairly judged other employees and disparaged them.

71. Follenweider wanted to discuss the issues with Complainant, but had concerns because he sometimes had a hard time communicating with Complainant because she would interrupt him. Follenweider wanted to handle the issues fairly with Complainant. To that end, he discussed the issues with both Weygandt a number of times and a person in the SLB's Human Resources office, Kim Burgess, in early October. In the discussions Follenweider had with Weygandt and Burgess, he never discussed terminating Complainant, as that was not his goal. Follenweider had not discussed his concerns regarding Complainant's behavior with Complainant.

72. Follenweider decided to have a meeting with Complainant on October 22, 2004, a Friday, to discuss what he observed to be a trend of poor interpersonal skills on Complainant's part.

October 22, 2004 Meeting

73. Toward the end of the day on October 22, Follenweider had Complainant come to his office, and he shut the door. Follenweider wanted to discuss three issues. Those issues were: 1) Complainant's unprofessional behavior surrounding the KRONOS issue; 2) Complainant's phone messages to Tina Miller regarding the reallocation of Bautista's position; and 3) Complainant's judging of other employees unfairly and getting involved in the personal business of other employees.

74. After Follenweider raised the issues with Complainant, she became very upset and said she wanted to get Weygandt involved in their discussion. Complainant and Follenweider then went to Weygandt's office. In addition to the issues Follenweider had with Complainant, Complainant raised the issue with Weygandt that Follenweider was "wishy washy." Complainant did not raise any other issues during the meeting, nor did she make any other complaints about Follenweider.

75. Complainant became increasingly upset in the meeting with Weygandt and Follenweider and began to cry. Weygandt then stopped the meeting, and went for a walk with Complainant to help her recompose herself. Weygandt was perplexed by Complainant's crying as it did not seem proportionate to the topics that were being discussed in the meeting. Weygandt thought that Complainant was possibly upset about something else, and would disclose it while they were alone walking.

76. While Complainant and Weygandt were walking, Complainant did not tell Weygandt that she was afraid of Follenweider. She also did not tell Weygandt that she had made any disclosures about illegal actions at the SLB. Complainant had the opportunity to discuss anything with Weygandt during the walk, but she did not.

77. Before the meeting resumed, Follenweider wrote down his recollection of what occurred during the meeting with Complainant in his office before they went to Weygandt's office. Follenweider wrote the information so it would be clear in his mind what happened and what was discussed.

78. When Follenweider, Weygandt and Complainant reconvened in Weygandt's office, Weygandt said she wanted to draft a performance plan for Complainant to address the issues Follenweider had identified. Weygandt further indicated that after the performance plan was in place, she wanted to meet with Complainant and Follenweider, individually, on a bi-weekly basis, to discuss Complainant's

progress. Weygandt did not consider the performance plan as disciplinary in nature; instead, she considered it to be training.

79. The specific elements of the performance plan were not discussed on October 22, 2004. Weygandt told Complainant and Follenweider that she would develop the plan over the weekend and would be able to discuss it on Monday. At the conclusion of the meeting, Complainant stated that she definitely wanted to remain in her position in the Financial Section and Follenweider indicated that he definitely wanted Complainant to remain in her position. At that point, Weygandt was not considering terminating Complainant.

80. During the October 22, 2004 meeting, Complainant raised the issue that Weygandt had discussed early certification for Complainant when she was hired into her permanent position. Weygandt, who had discussed, but never promised, Complainant early certification, did not certify Complainant after she had been on the job for six months. During Complainant's first six months on the job, Weygandt began to notice that Complainant was having problems with communications. Thus, Weygandt decided that she needed more time to evaluate Complainant before deciding to certify her. During the October 22, 2004 meeting, Complainant asked Weygandt to put her position regarding Complainant's certification in writing.

81. Over the weekend, Weygandt drafted the performance plan. Weygandt hoped that with specific direction and training, Complainant could easily succeed.

Complainant's Grievance

82. Weygandt intended to meet with Complainant on Monday, October 25, 2004, to go over the performance plan, but Complainant called in sick that day. Complainant had come in over the weekend and gathered her personal belongings and put her "to do" work in Bautista's inbox. Complainant was very upset by the meeting and could not eat or sleep. Complainant was so upset that she went to see her physician.

83. Complainant filed a grievance on October 25, 2006, stating that she felt discriminated against because of her "strong work ethic" and because she followed "company, state policies and procedures." Complainant's grievance further stated that she had been discriminated against when applying for new positions. The grievance also stated that Complainant felt she was working in a "hostile work environment" and that one of her immediate supervisors had "shown a great deal of anger and hostility towards her" and that she was in fear of her "emotional and personal well-being while in his employ." Complainant was referring to Follenweider.

84. When Weygandt saw the grievance, she wasn't sure what Complainant's complaints were, but noted that she was claiming discrimination and hostile work

environment. Weygandt became very concerned about those claims, but did not see the grievance as a whistleblower complaint because there were no claims of misspending.

85. Weygandt called the Human Resources office to see what her obligations were with respect to the grievance. The Human Resources office directed Weygandt to the Department of Natural Resource's Grievance Process, which she followed.

Investigation of Grievance Claims

86. When Weygandt read the grievance, it was the first time she had heard anything about Follenweider being angry or the existence of a hostile work environment. Weygandt wanted there to be an immediate investigation of those claims. When she called the Human Resources office, she learned that Mindy Elswick, the Risk Manager for the Department of Natural Resources, had already started an investigation into the allegations.
87. Elswick received a copy of the grievance with all of the attachments on October 26, 2004, and read through all of the material. Elswick spoke with Complainant on October 26 or 27th and told her that Weygandt would be addressing the grievance. Elswick and Complainant also discussed Complainant's rights and obligations under the Family Medical Leave Act. In that conversation, Complainant did not mention that she was afraid of Follenweider, nor did she mention violence of any kind.
88. Elswick conducted her investigation by speaking to a number of SLB employees. Follenweider and Brejcha were surprised by Complainant's allegations, and both mentioned that Complainant was confrontational and would initiate arguments over work issues.
89. Two other employees interviewed, Bautista and the other employee who had been overpaid compensatory time, were astonished by Complainant's allegations. Davis, who was also interviewed, indicated that he thought the hostile work environment emanated from Complainant, not from other people. Bautista also indicated that she thought Complainant, if anyone, created a hostile work environment. None of the witnesses indicated that Follenweider was ever violent or that Complainant was afraid of him.
90. Elswick did not speak to Complainant as part of her investigation because Complainant was out of the office on sick leave and did not answer her telephone or return calls.
91. Elswick's report concerning the investigation was completed on November 4, 2004, and she personally delivered it to Weygandt. Elswick concluded that there was no substance to Complainant's "expressed fear" of Follenweider, and the evidence suggested that the hostile work environment was of Complainant's own

making. Elswick further found that Complainant's allegations that Follenweider was a physical and emotional threat to her were untrue, and while Complainant was technically competent, she was lacking interpersonal skills.

92. On October 27, 2004, Complainant left Weygandt a voice message offering to resign. Weygandt did not think resignation was necessary, but did not return Complainant's phone call because she knew that Follenweider and the Human Resources office were attending to Complainant's situation.

Complainant's Termination

93. On November 4 or 5, 2004, Complainant left a voice message for Weygandt indicating that she was ready to return to work under two conditions. Those conditions were: 1) that she had a restraining order against Follenweider and 2) that there be a police officer with her in her cubicle. She left a telephone number where Weygandt could reach her.
94. Weygandt was very surprised by Complainant's voice message and found her requests and conditions for returning to work to be unreasonable. Weygandt attempted to call Complainant at the number she left, but was unable to reach her.
95. Weygandt sent Complainant an email on November 8, 2004, asking to meet with her on the morning of November 9 to discuss Complainant's voice message, Weygandt's final decision with respect to Complainant's grievance, and the conclusion of the October 22, 2004 meeting. Weygandt left Complainant a voice message containing the same information that the email did.
96. Also on November 8, 2004, Complainant went to the City and County of Denver building to obtain a temporary restraining order against Follenweider. She paid the filing fee for the restraining order, but did not actually obtain it because the judge's docket was too long and Complainant could not wait. Complainant did obtain paperwork concerning the temporary restraining order.
97. Complainant was testing for another position on November 8, 2004, which was held in the building where the SLB is housed. While she was in the building, Complainant decided to go to Elswick's office to ask her to be present at the meeting Weygandt had scheduled for the following day.
98. When Elswick learned that Complainant was there to see her, she contacted Weygandt, and they decided to meet with Complainant that afternoon instead of the next day. Someone in Elswick's office asked Complainant if she could return at 1:00 p.m. Because she had no place else to go, Complainant waited without leaving the Human Resources office for about an hour before the meeting.

99. Weygandt had already prepared Complainant's performance plan, as well as the response to her grievance, and was ready to go over those documents with Complainant. When Weygandt learned that she was going to meet with Complainant later that day, she also prepared a termination letter in the event that Complainant was still insisting upon having either a temporary restraining order, a security officer, or both. It was Weygandt's hope that she would not have to terminate Complainant.
100. Weygandt arranged for a state trooper, dressed in plain clothes, to attend the meeting because Elswick had indicated that she felt nervous that Complainant's behavior may escalate, and had previously stated in her investigation report that there should be security at any future meetings with Complainant.
101. Complainant, Weygandt and Elswick met in the Human Resource director's office at a conference table. The state trooper sat in the corner of the room. Weygandt began the meeting by going through the response, point by point, to Complainant's grievance, which Weygandt had denied.
102. After going through the grievance response, Weygandt asked Complainant if she still maintained the conditions of having a temporary restraining order and a security officer present before returning to work. Complainant responded by saying, "I have the restraining order right here," or words to that effect, and showed a copy of the receipt she received for the restraining order from the City and County of Denver.
103. Weygandt felt unhappy because they could no longer discuss the temporary restraining order issue because Complainant had already gone to get one. Given Complainant's conditions for returning to work, Weygandt felt she had no choice but to terminate Complainant.
104. Weygandt gave Complainant the termination letter she had drafted earlier that day. She also gave Complainant a copy of the performance plan, and told her that it wasn't an option they could pursue.
105. After the meeting, they all stood up and the state trooper escorted Complainant to her work area to retrieve any remaining items she had in her work area. Complainant felt humiliated. Weygandt treated Complainant respectfully and professionally throughout the meeting.
106. On November 19, 2004, Complainant sent an email to the Colorado Attorney General and another state employee alleging retaliation based upon the filing of the October 24, 2004 grievance. She further stated that she was instructed several times by Follenweider to ignore the state procurement rules. Moreover, she alleged that she was personally afraid of Follenweider and afraid for her personal well being.

DISCUSSION

I. GENERAL

A probationary employee is entitled to the same rights as a certified employee except that probationary employees are not entitled to a hearing to review a disciplinary action for unsatisfactory performance. Colo. Const. art. XII, § 13(10) and C.R.S. § 24-50-125(5). Probationary employees do not have a right to a pre-disciplinary meeting. Board Rule 4-27, 4 CCR 801. While the Board does not have jurisdiction to review a probationary employee's disciplinary action for unsatisfactory performance, it may review an action in which a probationary employee has alleged discrimination, constitutional violation, or another independent basis for a hearing. C.R.S. § 24-50-125.3 and *Williams v. Colo. Dep't of Corrections*, 926 P.2d 110, 113 (Colo. App. 1996). Complainant alleged a violation of the Whistleblower Act, and, as set forth above, the matter was set for an evidentiary hearing after proceeding through the Board's discretionary review process. Board Rule 8-46(B), 4 CCR 801.

A. Burden of Proof

In this *de novo* disciplinary proceeding, the Complainant has the burden to prove by preponderant evidence that the Respondent violated the Colorado Employee Protection Act. Section 24-50.5-101 et seq. C.R.S.

II. HEARING ISSUES

A. Respondent did not violate the Colorado Employee Protection Act.

Complainant, a probationary employee, argues that she was terminated in retaliation for making protected disclosures regarding violations of the procurement rules and the fiscal rules, and other alleged misdeeds. The Colorado Employee Protection Act, section 24-50.5-101 et seq., C.R.S. ("Whistleblower Act" or "Act") protects state employees from retaliation by their appointing authorities or their supervisors because of disclosure of information about state agencies' actions which are not in the public interest. *Ward v. Industrial Com'n*, 699 P.2d 960, 966 (Colo. 1985). The purpose of the Act appears in the legislative declaration, which states,

"The general assembly hereby declares that the people of Colorado are entitled to information about the workings of state government in order to reduce the waste and mismanagement of public funds, to reduce abuses in governmental authority, and to prevent illegal and unethical practices. The general assembly further declares that employees of the state of Colorado are citizens first and have a right and a responsibility to behave as good citizens in our common efforts to provide sound management of governmental affairs. To help achieve these objectives, the general

assembly declares that state employees should be encouraged to disclose information on actions of state agencies that are not in the public interest and that legislation is needed to ensure that any employee making such disclosures shall not be subject to disciplinary measures or harassment by any public official." Section 24-50.5-101, C.R.S.

The threshold determination is whether Complainant's disclosures fell within the protection of the Act. *Ward v. Industrial Comm'n*, 699 P.2d 960 (Colo. 1985). The Act defines "disclosure of information" as the "provision of evidence to any person or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." Section 24-50.5-102(2), C.R.S. Disclosures need not be written. *Id.* at 967. Complainant's disclosures to her supervisors regarding repeated procurement rule and fiscal rule violations by the SLB, if true, could constitute illegal and unethical practices as contemplated by the Whistleblower Act. The fiscal and procurement rules serve a critical public interest of proper management of public funds. An agency's failure to adhere to those rules could result in the waste and mismanagement of public funds. The Act's purpose is to promote disclosures to prevent "illegal" practices, and failure to adhere to fiscal and procurement rules clearly falls under that umbrella.

Each of Complainant's alleged disclosures is discussed below:

Lease Application Backlog Issue

When Complainant became aware of the backlog issue, she reported it Weygandt and others. However, her report was not a "disclosure" because Weygandt was already aware of the situation. Every person at the SLB Complainant told was already aware of the issue, and it was even the subject of a report by the State Auditor. The lease application backlog could be considered a waste of public funds or mismanagement as the SLB was losing revenue by not collecting rents on the land it owned. However, Complainant's statements cannot be considered "disclosures" for purposes of the Act because Complainant cannot be said to have disclosed something that was already widely known.¹

Liquidating Purchase Orders

Bautista instructed Complainant to liquidate some purchase orders to allow a project manager to purchase computers. Complainant did not want to perform this task because she believed it violated procurement and fiscal rules because she incorrectly believed that the funds should have been returned to the General Fund. Because the SLB is a cash funded agency, its unused funds do not revert to the General Fund, and can be used to further any SLB goals. Complainant did not disclose any practice or action that constituted the waste of public funds, abuse of authority mismanagement, or

¹ Even if this were considered a disclosure, Complainant demonstrated no causal connection between it and her termination. *Ward*.

other wrong doing, when she expressed her disapproval for liquidating the purchase orders. Thus, any allegations Complainant raised regarding the purchase orders are not "disclosures" under the Act. Moreover, the evidence demonstrated that Complainant "disclosed" this information "with disregard for the truth or falsity thereof" under Section 24-50.5-103(1)(a), C.R.S. Therefore, the Act does not apply to this "disclosure."²

Kris Chavez Contracts

While Complainant believed that Kris Chavez had multiple contracts and multiple federal identification numbers, there was no evidence presented that the SLB was acting in any way inappropriate or illegally with respect to Chavez. Chavez had one contract in his personal name and one in the name of his business. There was nothing illegal or improper about Chavez having more than one contract, as long as his contracts combined did not exceed \$25,000, which they did not. While Complainant may have believed that the SLB was somehow allowing Chavez to circumvent the law, this was not the case. Thus, any statements Complainant made about Chavez's contracts were not disclosures of any practices or actions that constituted the waste of public funds, abuse of authority, mismanagement, illegal or inappropriate activity, and cannot, therefore, be considered to be "disclosures" under the Act.

Lost Purchase Orders

Because the Department of Natural Resources accounting office had lost a number of purchase orders, Weygandt and Follenweider asked Complainant to draft a memorandum summarizing the issue so they could address it. Complainant did draft the memorandum, but mistakenly believed that Weygandt and Follenweider wanted to get someone in trouble. Complainant's memorandum did contain information about purchase orders being lost, and there being a need to reconstruct them. While such actions could possibly constitute mismanagement, Complainant's memorandum cannot be considered a "disclosure" under the Act because Follenweider, the person to whom the memorandum was addressed, was already aware of the issue and had directed to Complainant to draft the memorandum. Again, Complainant cannot disclose something that is already known to the person receiving the information.

Reducing Purchase Orders

While Complainant believed that it was illegal or improper to reduce purchase orders to \$5,000 or less to assure that contractors were timely paid, she was incorrect. Reducing the purchase orders in no way constituted an abuse of authority,

² Complainant argues that even if some of her allegations may be wrong, they are still protected disclosures under the Act if she had a good faith belief as to their truthfulness and she had a reasonable basis for her belief. Complainant did not establish that she had a reasonable basis for her belief about the accuracy of her allegations. However, assuming Complainant did have a good faith belief as to the accuracy of her allegations, and there was a reasonable basis for her belief, Complainant has failed to establish that her allegations were the basis of her termination.

mismanagement, waste of funds, or any other action which was illegal. Therefore, any statements Complainant made about this issue are not "disclosures" under the Act.

SLB Hire of Temporary Employee

The SLB followed proper procedures when it hired a temporary employee. Complainant mistakenly believed that the SLB had violated State Personnel Board rules and Director's procedures by not posting the position and having applicants test for it. However, there is no requirement that a temporary position be posted or that there be testing for it. Although Complainant told Weygandt that she thought the temporary employee was improperly hired, she was not reporting any waste of public funds, mismanagement, abuse of authority, or any other inappropriate or illegal activity. Complainant's statements regarding this issue are, therefore, not "disclosures" under the Act. Further, having clearly failed to actually read the applicable rules and procedures, Complainant acted with disregard for the truth or falsity of her allegations. Therefore, the Act does not apply to this "disclosure."

Hiring of Kevin Holst

The SLB hired Kevin Holst, a law school graduate who was awaiting his bar results, to do some research. Holst, a contractor, was to be paid pursuant to a purchase order. Complainant alleges that she disclosed that Holst began working for his purchase order before it was approved by the Department of Natural Resources accounting office. Complainant was correct that an employee working under a purchase order cannot begin work until the purchase order is approved. However she was incorrect in her assertion that Holst began working before his purchase order was approved. Even assuming Holst had started work before his purchase order had been approved, he would have been the only one to have suffered any consequences; he would not have been paid for any hours he worked prior to his purchase order approval. Once again, Complainant's statements did not disclose a waste of public funds, mismanagement, an abuse of authority, or any illegal or inappropriate activity.

Starboard Realty and Sole Source Justification

Complainant alleges that she made disclosures about a contractor, Starboard Realty, receiving a contract through sole source justification funding instead of through the competitive bidding process. The SLB did not ultimately use a sole source justification for Starboard Realty's contract. However, there is nothing illegal or improper about sole source funding if a contract meets the necessary requirements. Complainant's complaints about Starboard Realty and it receiving a sole source justification were unfounded and did not disclose any public waste, mismanagement, abuse of authority, or any other inappropriate or illegal practice, and were, therefore, not "disclosures."

Complainant's Grievance

Complainant's grievance contained a number of allegations, including discrimination based on her work ethic and her following of "company state policies and procedures," and for applying for other positions within the SLB and throughout the state system. In that grievance, Complainant also alleged that she felt like she was working in a hostile working environment and that Follenweider had "shown a great deal of anger towards" her and that she was in fear of her emotional and personal well-being while working for him. In her grievance, Complainant did not allege that there had been a waste of public funds or mismanagement. Feasibly, Complainant could have been alleging an abuse of authority in alleging a hostile work environment and her fear of Follenweider and his anger. However, these are not the types of disclosures contemplated by the Act, and cannot be considered "disclosures."

The next determination is, even assuming Complainant made protected disclosures, whether those disclosures were "a substantial or motivating factor" in Respondent's decision to terminate Complainant. *Ward*, 699 P.2d at 968; Section 24-50-103(1), C.R.S. Complainant has failed to prove that Weygandt was in any way motivated by Complainant's alleged disclosures when she terminated her. In fact, the evidence demonstrated that Weygandt attempted to address Complainant's concerns when she became aware of them. For example, when Complainant misunderstood the hiring process for temporary employees, Weygandt went over the relevant personnel rules with Complainant and sent out an email to all SLB employees explaining the rules for hiring temporary employees. Additionally, when Weygandt read the allegations contained in Complainant's grievance, she called the Department of Natural Resource's Human Resources office to begin an immediate investigation, only to learn that an investigation had already been initiated. Furthermore, when Complainant complained to Bautista that things were not being done properly, Bautista viewed the complaints only as training issues, and attempted to enhance Complainant's knowledge of the proper procedures.

Complainant did make repeated groundless complaints concerning the SLB and its actions. However, those complaints were not a substantial or motivating factor in Weygandt's decision to terminate Complainant. Instead, Weygandt decided to terminate Complainant only after Complainant set unreasonable and untenable conditions for her return to work. Weygandt, being aware of some of Complainant's allegations, including her grievance, had no intention of terminating Complainant. To the contrary, Weygandt prepared a response to Complainant's grievance, as well as a performance plan to assist Complainant in improving her work performance. It was only after Complainant informed Weygandt that she intended to proceed with obtaining a temporary restraining against Follenweider and showed the paperwork she had received from the City and County of Denver regarding the restraining order, that Weygandt made the decision to terminate Complainant. Complainant was a probationary employee who had already demonstrated a lack of interpersonal skills which negatively impacted the SLB, and was to be placed on a performance plan. It was unreasonable for Complainant to obtain a temporary restraining order against

Follenweider, her second level supervisor, or to require that a security guard protect her at work as a condition of employment. Elswick's investigation revealed that Follenweider was in no way a threat to Complainant. Weygandt's decision to terminate Complainant was not related to Complainant's alleged disclosures. Complainant has failed to demonstrate that Weygandt was motivated by any protected disclosures in terminating her.

Even if Complainant had shown that Weygandt was motivated by her protected disclosures in terminating her, Respondent would then have the opportunity to prove that "it would have reached the same decision even in the absence of protected conduct." *Ward*, 699 P.2d at 968. The Findings of Fact and discussion above make it clear that Respondent would have reached the same decision even in the absence of any protected disclosures by Complainant. Therefore, Complainant cannot prevail on her whistleblower claim.

B. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3), 4 CCR 801.

Given the above findings of fact an award of attorney fees is not warranted. Complainant has failed to demonstrate that Respondent violated the Whistleblower Act when it terminated her. Respondent terminated Complainant for reasons unrelated to her alleged disclosures. There was no competent evidence presented which would lead to the conclusion that Respondent imposed the personnel action against the Complainant in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth.

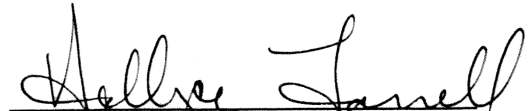
CONCLUSIONS OF LAW

1. Respondents did not violate the Colorado Employee Protection Act.
2. Attorney fees are not warranted.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded

Dated this 5th day of July, 2007



Hollyce Farrell
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is \$50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 8 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.

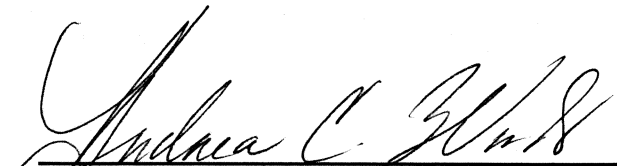
CERTIFICATE OF SERVICE

This is to certify that on the 6th day of July, 2007, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

N. Nora Nye, Esq.
Nye & Associates, LLC
1556 Williams Street, Suite 201
Denver, CO 80218-1635

and in the interagency mail, to:

Stacy L. Worthington
First Assistant Attorney General
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1525 Sherman Street, 5th Floor
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Andrea C. Woods